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IN THE

Supreme Court of the United States

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, *Appellant*,

v.

UNITED STATES OF AMERICA, GUYANDOT AND TUG RIVER RAILROAD COMPANY, and NORFOLK AND WESTERN RAILWAY COMPANY, *Defendant-Appellees*, and INTERSTATE COMMERCE COMMISSION, *Intervening Defendant-Appellee*.

No. 73.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

Brief for Appellant

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LEWIS PRINTING CO., INC., RICHMOND, VA.

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Brief for Appellant

I.

CITATION OF THE OPINION BELOW.

The opinion delivered in the court below is reported as *Chesapeake & O. Ry. Co.* v. *United States et al.*,

(*Interstate Commerce Commission, Intervener*), in 35 F. (2d) 769.

II.

STATEMENT OF THE CASE.

This suit was brought pursuant to the provisions of the Urgent Deficiencies Appropriations Act, c. 32, 38 Stat. L. 219, 220, U. S. C. A., Title 28, Sections 41 (28), 43-48, inclusive, (Appendix, pp. i-v). Its purpose is (1) to set aside and annul (a) so much of a certain certificate and order of the Interstate Commerce Commission (hereinafter generally referred to as the "Commission"), issued and entered on July 23, 1928, in Finance Docket No. 5161 (R. 239-241), which was heard and disposed of together with Finance Docket No. 6067 and Finance Docket No. 4818, and (b) so much of certain other orders subsequently entered in said proceedings (R. 241-3), and especially an order entered therein on November 1, 1928 (R. 244), as authorized the Guyandot and Tug River Railroad Company (hereinafter generally called the "Guyandot") to construct and operate a line of railroad from Wharncliffe, West Virginia, to Gilbert, West Virginia, and (2) to enjoin the Guyandot and the Norfolk and Western Railway Company (which owns the entire capital stock of the Guyandot except directors' qualifying shares, and is hereinafter generally called the "Norfolk"), and each of them, from constructing and operating the said line of railroad from Wharncliffe to Gilbert under or in pursuance of the authority or pretended authority of the orders aforesaid (R. 15-16).

Pursuant to said Urgent Deficiencies Appropriations Act, c. 32, 38 Stat. L. 220, U. S. C. A., Title 28, Section 47, the suit was heard and determined by three judges, one of whom was a circuit judge, all of whom concurred in the opinion to which reference is made above and in the decree entered on December 14, 1929, dismissing the suit, from which this appeal is taken.

The action of the Commission in authorizing construction of the Guyandot's proposed line is challenged as invalid primarily and substantially on the same legal ground—there is little or no dispute as to the facts—as that set out by Commissioner Porter in his dissenting expression (R. 58-64), which is that such construction will duplicate, at heavy cost, other entirely adequate railroad facilities without substantial result other than the creation or promotion of competition between carriers and competitive service to shippers. The Guyandot's proposed line will extend from territory heretofore served by the Norfolk into territory fully provided with efficient railroad facilities by the Virginian and appellant, and will render no substantial service which other facilities cannot render with greater efficiency and at less cost. Appellant's position is that the creation of competition through new construction of this character, far from warranting a certificate of public convenience and necessity, is inimical to the public interest and contrary to the theory and purpose of the Transportation Act of 1920, in that there are involved a waste of resources the burden of which will fall upon the public and a wasteful competition hurtful to appellant and the public alike. In short, appellant seeks to enjoin this construction upon the ground that it typifies the useless competitive railroad building which the Transportation Act was de-

signed to prevent. The issue thus presented cannot be fully appreciated without an understanding of the geographical features of the territory involved, and these will, accordingly, be here described.

A—THE GEOGRAPHY OF THE TERRITORY INVOLVED

Appellant filed as Exhibit 1 with its petition in the court below a map showing the railroads serving the coal fields of southern West Virginia, and the principal streams and mountain divides of that territory. (Side folio 24, opposite R. 16.) We believe the Court can most readily acquire a view of the groundwork of the case by inspection of this exhibit, and we have therefore inserted an enlargement thereof at the back of this brief.

It will be seen that the railroad of the appellant, indicated upon the map by a solid yellow line, enters West Virginia from the east not far from Clifton Forge and that its main line passes through Hinton, Prince, Deepwater, Charleston, Barboursville, and Kenova, thence crossing the Big Sandy River just south of Catlettsburg and following the southern bank of the Ohio River to the west. The southern West Virginia coal fields are reached principally over branch lines extending south from this main line. Of these branch lines, that extending from Barboursville southeastwardly through Logan to Gilbert, known as the "Logan Subdivision", is the most important in this case. The branch extending in a southwesterly direction from Prince down Winding Gulf to Stone Coal, known as the "Winding Gulf Branch", should also be noted.

The line of the Virginian Railway Company, generally

termed by us the "Virginian", which is shown in solid green on the map, after passing (westbound) through Roanoke, Princeton, and Matoaka, enters the New River coal fields over Clark's Gap, and at Elmore turns to the north, passing over three divides to Deepwater, on appellant's main line. Of the lateral lines of the Virginian, those significant here are the short line from Elmore to Itmann, and (connecting with it at Itmann) the Virginian line authorized by the Commission in the proceedings here under consideration. This latter line is indicated on the map by green-dashed lines.

The line of the Norfolk is shown in red. It enters the coal fields west of Bluefield and passes along Tug Fork of the Big Sandy River to the southward of the lines already described, through Welch, Wharncliffe, Williamson, and Louisa, thence following the Big Sandy River northward, crossing the line of the appellant and the Ohio River just west of Kenova, and following the north bank of that river to the west. It has various branches of which the only one necessary to be noticed here is the one extending northwardly from Bluestone Junction to Matoaka, on the Virginian's main line. *The line in red dots connecting Wharncliffe and Gilbert is the one with which this suit is concerned.*

The topographical features of the territory important in this case are: (1) the high mountain range which extends from near Huntington in a southeasterly direction, passes between Gilbert on the north and Wharncliffe on the south, and generally separates the Guyandot Valley, occupied principally by appellant's lines and to some extent by the Virginian's, from the Tug River Valley, occupied by the main line of the Norfolk (R. 59); and (2) the Guyandot River, which is followed by the pres-

ent and proposed line of the Virginian from its upper reaches to Gilbert, and thence by the appellant's Logan Subdivision, and which affords a down grade from Gilbert to Barboursville.

B—THE PROCEEDINGS BEFORE THE COMMISSION.

On May 7, 1925, appellant filed its application in Finance Docket No. 4818 for a certificate that public convenience and necessity required the construction by it of (a) an extension of its Logan Subdivision eastwardly from Gilbert to Mullens, and (b) an extension of its Winding Gulf branch from Stone Coal westwardly to Mullens (R. 32). On October 29, 1925, the Guyandot applied in Finance Docket No. 5161 for a similar certificate authorizing it to construct a line extending from a connection with the Virginian at Elmore westwardly to Gilbert and thence across the mountain divide already described a distance of 10.5 miles to Wharncliffe on the main line of the Norfolk (R. 32, 34). And on January 21, 1927, the Virginian, through its subsidiary, the Virginian and Western Railway Company, made application for certification by the Commission that public convenience and necessity required that it construct an extension of its Elmore-Itmann branch from Itmann westwardly down the Guyandot River to a connection with appellant's Logan Subdivision at or near Gilbert (R. 33).

It is thus apparent that by three several applications filed at widely varying dates each of the applicants sought authority to build substantially identical lines down the Guyandot River between Itmann and Gilbert, and that

the application of the Guyandot additionally sought authority for the line between Gilbert and Wharncliffe, which is the only line involved in this case.

No objections to the granting of any of the applications were filed except by the other applicants (R. 33). Accordingly, the Examiner before whom the hearings were had announced that, though the applications would be heard in the order in which they were filed, it ought to be stipulated that all parties could refer to any portions of any of the transcripts, which was done, and as a consequence of which each applicant presented its evidence in support of its application and in opposition to the applications of the other parties as a unit (R. 135-6).

The resulting record embraced 710 pages of testimony and 119 exhibits (R. 134), far the greater part of which, as would be expected, was exclusively devoted to the contentions of the respective applicants concerning construction of the line in the Guyandot basin which each sought authority to construct, but as to which no question arises in this suit. Only a relatively small portion of the evidence had any bearing whatever upon the Gilbert-Wharncliffe line.

On July 23, 1928, the Commission, through Division 4 thereof, consisting of Commissioners Woodlock, Porter and Farrell, filed an elaborate report which occupies 33 pages of the printed record and which reviews in great detail the facts established by the evidence (R. 31-64). Commissioners Woodlock and Farrell united in a majority finding that the public convenience and necessity required construction by the Virginian of the line in the Guyandot basin, and further that a certificate should issue authorizing the Guyandot to construct and operate that part of its proposed line which extended

from Gilbert to Wharncliffe (R. 57). Commissioner Porter, while concurring (with qualifications unimportant here) in the finding of the majority as to construction of the Itmann-Gilbert line by the Virginian, dissented from the finding of convenience and necessity for construction of the Gilbert-Wharncliffe line by the Guyandot and filed a separate expression stating the grounds of his dissent (R. 58-64).

Pursuant to the majority finding, an appropriate certificate and order was entered on July 23, 1928 (R. 239-241). The effective date of the order was from time to time postponed until October 22, 1928, pending consideration of appellant's petition for reconsideration and reargument of all the matters involved, which petition was finally denied (R. 241-243). Appellant, however, did not rest here, but filed a further petition for reconsideration and reargument of the action of the Commission *only in so far as it authorized the Gilbert-Wharncliffe line of the Guyandot;* and thereupon, on October 20, 1928, the Commission ordered :

> "That the effective date of the certificate and order issued in these proceedings on July 23, 1928, be and it is hereby, further postponed to November 22, 1928, *except in so far as said certificate and order authorizes the Virginian & Western Railway Company to construct a line of railroad in Wyoming and Mingo Counties; W. Va."* (R. 243; italics ours, and so throughout this brief except in the names of cases and where otherwise stated.)

This severance by the Commission of its action in these proceedings, whereby it left in effect authority for the Virginian's new line but suspended for reconsidera-

tion its authorization of the Guyandot's Gilbert-Wharncliffe line, assumes major importance in connection with the assigned error of the court below in holding that the Virginian's and the Guyandot's authorized lines constituted a unified project, and that the authority for the Virginian's new line was contingent upon and inseparable from authorization of the line in this suit sought to be enjoined.

The upshot before the Commission was that the further petition for reargument was finally denied (R. 244), with the result that the report of Division 4 stands as the final word from the Commission on the questions here involved.

C—THE PROCEEDINGS BELOW.

The order of the Commission finally denying a rehearing was made November 1, 1928 (R. 244). The petition herein was filed December 8, 1928 (R. 1), and the case presented and argued on January 3, 1929 (R. 78-80). On November 16, 1929, the Court rendered its opinion that the petition should be dismissed (R. 80-97), and the decree dismissing the petition was entered December 14, 1929 (R. 97). On the same day, December 14, 1929, the petition for appeal and assignment of errors were filed, and the appeal allowed and notice of appeal given (R. 97, 98, 101; 103-4). Appropriate proceedings looking to the making up of the record were then had, and terminated with the order of the court entered March 6, 1930 (R. 246-7), approving the statement of the evidence which is set forth in the printed record. The time for the appellant to docket the appeal and file the record was by successive orders (R. 102-3, 111-2, 247, 253) ex-

tended until April 15, 1930, and the statement of points relied on and the designation of the portions of the record to be printed were filed in this Court April 8, 1930 (R. 253).

D—THE RECORDS IN THE COURT BELOW AND ON APPEAL.

Asserting, as it did, among other things, that the action of the Commission complained of in its Bill was void because without substantial support in the evidence, appellant was constrained to introduce before the lower court the entire record before the Commission. At the same time, appellant believed that the report of the Commission, including the separate expression of Commissioner Porter, which in no way contradicted but in some respects supplemented the facts stated by the majority, constituted an elaborate and complete statement of all the material facts established by the evidence; and appellant expressly disavowed denial of any fact—as distinguished from conclusions drawn from the facts—stated in the report (R. 134). Appellant relied upon the Commission's own review of the facts as establishing complete want of any factual basis for its findings.

Appellees, on the other hand, extracted from the record certain testimony to which the Commission had apparently given no weight whatever, and set this up as substantially supporting the action of that body. *Thus was presented the anomalous situation that those attacking the validity of what was done by the Commission freely accepted as supported by the record every fact cited or referred to in the report, while those who were endeavoring to sustain the validity of what was done resorted*

for support to testimony so little regarded by the Commission as to escape any notice whatever in a report which bears every evidence that it purports fully to review all the significant proof.

The court below followed appellees in their excursion beyond the facts stated in the report (and admitted by appellant, as above stated) and, in sustaining the order, referred not merely to the findings of the Commission but also to certain "items of evidence" which in its judgment supported the order (R. 91-6).

The result was that the case emerged from the lower court with the issues augmented. The question was not alone whether the findings made by the Commission were adequate, but further whether the additional considerations pointed out by the court itself sustained what the Commission had done.

Having in mind its duty under Equity Rule 75, 226 U. S., Appendix, p. 23, to state the evidence for the record on appeal in simple and condensed form and to omit all parts of the record not essential to the decision of the questions presented, appellant filed a statement of the evidence which it submitted as a complete narrative of all the evidence which was not either (1) merely corroborative of the admitted facts stated in the report of the Commission, and therefore superfluous, or (2) entirely without bearing upon the findings as to the Gilbert-Wharncliffe line made by either the Commission or the court below, and therefore immaterial.

Appellees moved the court to reject the statement so filed and to require that there be brought to this Court, either in narrative form or in the exact words of the witnesses, the entire record before the Commission in Finance Dockets Nos. 4818, 5161, and 6067, without any

deletion whatever, and consequently without any regard to the duty imposed upon the parties by the rule of this Court above referred to (R. 107, 108). This motion the court below overruled and required that the statement of the evidence omit all matter merely corroborative of facts stated in the report and, for the rest, include certain evidence specified by the court itself as embracing, together with the Commission's report, all evidence material to the issues upon which this Court is called on to pass (R. 111, 112).

It thus comes about that this Court has before it a greatly reduced record, but one which the court below certifies as embracing not only every fact deemed by the Commission worthy of mention, but in addition all the evidence advanced by appellees and accepted *in toto* by the lower court as giving support to the order. Consideration of the record will establish that in this connection the lower court leaned rather to inclusion than exclusion of evidence, for, in appellant's view at least, it is not possible to perceive any relevancy in much that was required to be incorporated in the record on appeal.

E—THE QUESTIONS PRESENTED AND THE FACTS MATERIAL TO THEIR CONSIDERATION.

The issues in the case naturally group themselves about (1) the findings of the Commission, (2) the additional findings of the lower court, and (3) the decision of the court below that the Virginian's Itmann-Gilbert line and the Guyandot's Gilbert-Wharncliffe line were authorized as a unified and inseparable single project which must stand or fall as a whole.

(1) The Only Findings of the Commission—That Competition Between Carriers and Competitive Service to Shippers Will Be Created or Increased—Give No Support to the Order.

> "The construction of that part of the N. & W.'s proposed line from Wharncliffe to Gilbert would enable the N. & W. to compete with the C. & O. for westbound traffic from the Guyandot Valley, and would assure operators in the territory competitive service to the west." (R. 57.)

Comprised in this one sentence are *all the findings* of the Commission in support of the action we here seek to enjoin. We submit as a matter of law, presently to be argued, that these facts, confined as they are to the bare consideration that competition will result from the new construction authorized, and standing unsupported by any finding or evidence that such competition is or will be in the public interest, both fail to give any support to the finding that public convenience and necessity do or will require the Gilbert-Wharncliffe line and demonstrate that the action of the Commission in respect to that line can have been predicated only upon an erroneous conception of the theory and purpose of the Transportation Act of 1920 concerning new railroad construction.

It will be pertinent for the Court to consider that the Commission authorized this construction upon the naked findings referred to in the face of the following indisputable facts stated in its report, which, taken together, afford the basis for appellant's contention that construction of this line will be positively detrimental to the public interest.

(a) THE SOLE PURPOSE OF THE CONSTRUCTION AUTHORIZED ON THE PART OF THE GUYANDOT IS THE THROUGH TRANSPORTATION OF WESTBOUND COAL.

This is established by the quotation set forth on the previous page and by the following extract from the Commission's report:

> "For economy in the cost of transportation westbound coal from all of the Guyandot basin, and from a small contiguous area on the upper end of the Virginian's Winding Gulf line, should move over the proposed line [of the Virginian]. The evidence on this point is undisputed and convincing. * * * It is represented that the proportion shipped west in the first nine months of 1927 *may be taken as normal.* * * * The coal shipped west in 1927 probably included a small quantity destined to local points east of Kenova, *but this is held to be negligible, and Kenova may be taken as a common point in all routes to the west.*" (R. 38-9.)

(b) THE VIRGINIAN'S LINE FROM ITMANN TO GILBERT AND APPELLANT'S LOGAN SUBDIVISION FURNISH A DOWN GRADE AND ENTIRELY ADEQUATE ROUTE FOR THE TRANSPORTATION OF ALL WESTBOUND COAL PASSING THROUGH THE GUYANDOT VALLEY.

Speaking of the grades on this route, the Commission found that "there would be no adverse grades above Gilbert" except a 0.22 per cent limiting grade between Peach Creek and Kenova (R. 39-40).

Notwithstanding that inadequacy of appellant's line from Gilbert to the West would be perhaps the most important fact that could be adduced in support of the find-

ing that public necessity requires the alternate route afforded by the Guyandot's proposed line, the Commission, in its report, never so much as hints at the existence of any such justification. On the other hand, Commissioner Porter, supplementing the majority findings, says:

> "There is no hint in this record anywhere but that this territory is being economically and efficiently served by the Chesapeake & Ohio and the Virginian, and that these carriers have a present capacity far beyond that now required of them. Nor will the construction here authorized from Itmann to Gilbert alter the situation. *There is a splendid outlet from Gilbert to Barboursville and then to the west over the main line of the Chesapeake for the coal produced in this region.*" (R. 60.)

> "To sum up, then, we have a situation where the construction by the Virginian of this link between Itmann and Gilbert will form a splendid arrangement for traffic originating thereon as well as for some Chesapeake & Ohio coal moving eastbound to tidewater from the lower Guyandot Valley and Virginian coal moving westbound from the upper Guyandot Valley. The service will be complete and for aught we know will be fully adequate to meet the needs of shippers along the line." (R. 62-3.)

This distinct finding is strengthened by the absence, already alludetl to, of any suggestion, direct or indirect, in the report of the Commission that appellant's Logan Subdivision and its main line beyond Barboursville could not easily and efficiently transport to Kenova and points west all the traffic which could be delivered at Gilbert from the new line of the Virginian.

(c) THE PROPOSED GILBERT-WHARNCLIFFE LINE MUST CROSS A MOUNTAIN DIVIDE OVER GRADES SO HEAVY AS TO REQUIRE "DOUBLING", AND WILL INVOLVE A HEAVY COST WHICH ULTIMATELY WILL FALL UPON THE PUBLIC.

It is established by the Commission's report that the Gilbert-Wharncliffe line will extend 10.5 miles across the divide which naturally marks off the Norfolk's territory from that of the Virginian and appellant (R. 34); that leaving the Guyandot Valley a grade of 1.04 per cent will be encountered (R. 42); that trains using this line must be separated into sections through the process of "doubling" and transported piece-meal over the grade (R. 42); and that this line, thus shown to be disadvantageous from an operating standpoint, would cost $2,500,000 (R. 56).

(d) THE ROUTE VIA THE GILBERT-WHARNCLIFFE LINE WILL BE LONGER AND MATERIALLY LESS ECONOMICAL THAN THAT VIA APPELLANT'S LOGAN SUBDIVISION.

The distance from Elmore to Kenova is 151 miles via the Logan Subdivision, and 158 miles via Wharncliffe (R. 39).

Appellant claimed before the Commission that the cost of moving coal via Wharncliffe would be 90 cents a car, or 1.69 cents a ton more than via Gilbert and the Logan Subdivision, and this exclusive of interest charges on the cost of the Gilbert-Wharncliffe line (R. 42). Of this claim, the Commission found that "the C. & O.'s estimate

of 90 cents a car in favor of its own route does not appear excessive" (R. 43).

Having in mind the facts found by the majority and set forth above, Commissioner Porter compared the two routes in the following language:

> "The majority here find public necessity requires that the Norfolk & Western build 10.5 miles across this mountain ridge from Wharncliffe to Gilbert, *thus invading a territory new to it,* except for the traffic that it now receives through the Matoaka gateway, and which nature seems to have raised as a barrier against its entrance. *This construction is to be at a cost of* $2,600,000 *and will have an adverse grade as much as* 1.04 *per cent, which will require doubling by the trains in rising from the Guyandot River Valley and crossing this ridge.* There is no hint in the record anywhere but that this territory is being economically and efficiently served by the Chesapeake & Ohio and the Virginian, and that these carriers have a present capacity far beyond that now required of them. *Nor will the construction here authorized from Atmann to Gilbert alter the situation.* There is a splendid outlet from Gilbert to Barboursville and then to the west over the main line of the Chesapeake for the coal produced in this region. *From Gilbert to Barboursville, a distance of* 90.5 *miles, there are uniform and consistently favorable grades and for more than half of this distance the line is double-tracked.* From this same territory there are already three additional outlets to the west, one over the Virginian and the Chesapeake & Ohio at Deepwater; one by the Virginian and the Chesapeake & Ohio at Pemberton; and one by the Virginian and the Norfolk & Western at Matoaka. It is conceded in the record

that none of these is equal to the route through Barboursville, though in the first nine months of 1927, 45,770 cars moved via Matoaka and the Norfolk & Western. *The majority refer to the indisputable fact that it will cost 90 cents a car more to move coal over the new construction by way of Wharncliffe than over the Chesapeake & Ohio by way of Gilbert and Barboursville and this without making any allowance whatever for interest on investment or other fixed expense.* In fact, the majority, as it will be observed in their opinion, concede in referring to this new proposed route:

> *"'Its route would not be as economical for westbound traffic as a route via Gilbert and the Chesapeake & Ohio and requires building a line from Gilbert to Wharncliffe at a cost of* $2,500,000. *This line would have no immediate use except to connect the N. & W. main line with the Guyandot Valley. Ultimately it would develop some coal traffic.'"* (R. 59-60.)

(2) The Supplementary Findings Made by the Court Below.

The court below was of the opinion "that there are a number of items of evidence" showing that public convenience and necessity require the construction of the Gilbert-Wharncliffe line (R. 91). In addition to the findings of the Commission that competition between carriers and competitive service to shippers would result, the opinion enumerates the following:

> (a) "The proposed line is necessary for the development, in the future, of the coal-bearing lands tributary to such proposed line from Gilbert to

Wharncliffe on Gilbert and Horsepen Creeks." (R. 91.)

(b) "The evidence shows clearly that the Gilbert-Wharncliffe line is necessary in order to accomplish economies in operating costs in connection with traffic now moving by way of other lines of the N. & W., and that these economies cannot be accomplished without the construction of this short line." (R. 92.)

(c) "The I. C. C. was evidently of the opinion that the construction of the new short line was necessary to enable the N. & W. to participate in the coal, lumber and other traffic originating along or destined to points on the new line to be built by the Virginian from Itmann to Gilbert"—quoting the language used by the Commission in its findings as to competition, with the added expression from the report that "the N. & W. might be disposed to permit the exploitation of the lands of the Pocahontas Company, provided it receives the westbound tonnage therefrom at Wharncliffe." (R. 94.)

(d) "The I. C. C. evidently considered that the new line from Gilbert to Wharncliffe was necessary to prevent the bottling-up of the Virginian by having only one active western outlet." (R. 95.)

(e) "We are of the opinion that it is to the interest of the public * * * to have a cross line for the purpose of carrying freight and passengers of local people from one railway [the Norfolk] to the other [the Chesapeake and/or the Virginian]." (R. 96.)

In order to appraise the validity of these findings and determine whether they are supported by the record and

in turn support the action of the Commission, the Court must consider the following facts:

(a) As to Coal Traffic to Be Originated on Gilbert and Horsepen Creeks.

Inspection of Exhibit 56 (opposite R. 222) and Exhibit 54 (opposite R. 220) demonstrates that Gilbert and Horsepen Creeks lie in the Guyandot Valley, are tributary to the Guyandot River, and are readily accessible to development by either the Virginian's new line or appellant's Logan Subdivision, each of which follows the course of the Guyandot River and connects with the other at Gilbert. (See map at back of this brief.)

The coal deposits in question would have to be reached by a line up Gilbert Creek to its intersection with Horsepen Creek, and the starting point of this branch line would be at the mouth of Gilbert Creek, a point on the Virginian's new Itmann-Gilbert line and within half a mile of appellant's Logan Subdivision (Exhibit 1, opposite R. 16, whereon Gilbert and Horsepen Creeks are represented and, though not named, can be identified through cross-reference to Exhibit 56, opposite R. 222; map at the back of this brief). If developed from the Guyandot's proposed Gilbert-Wharncliffe line there would be required, not only the construction and consequent expenditure incident to that line, but also the construction of a branch line tributary to it extending five miles and costing $600,000 (R. 217).

It is evident that the Commission did not regard the coal deposits on Gilbert and Horsepen Creeks as a justification for its authorization of the Gilbert-Wharncliffe line, for it plainly stated the reasons that prompted its

action to be the purely competitive considerations already alluded to, and as to any origination of traffic by that line, contented itself with the casual observation, in the descriptive part of its report, that "ultimately it would develop some coal traffic." (R. 56).

The question here, then, is whether the existence of coal deposits on Horsepen and Gilbert Creeks is substantial, or any, evidence of public convenience and necessity for the Gilbert-Wharncliffe line, in view of the material facts that these deposits can be reached with far greater facility from either appellant's existing line or the new line of the Virginian than from the main line of the Norfolk, and that both the former lines, by avoiding necessity for crossing the mountain divide and by affording a shorter route to all common points, offer substantial economies the burden of the loss of which will ultimately fall upon the public, and this even without reference to the expenditure involved in the construction of the Gilbert-Wharncliffe line itself.

(b) As to Operating Economies.

Certain historical facts are pertinent in this connection. The Virginian, which was built primarily to handle eastbound coal only (R. 53), sought from the outset to avoid publication of westbound through rates for any coal originating on its line, and when ordered by the Commission to place such rates in effect (*Wyoming Coal Co.* v. *Virginian Rwy. Co.*, 96 I. C. C. 359), it attempted to comply by publication in connection with the Norfolk only. In proceedings which, in certain of their phases, came before this court for review and were here affirmed (*Wyoming Coal Co.* v. *Virginian Rwy. Co.*, 98

I. C. C. 489; *Virginian Rwy. Co.* v. *United States*, 272 U. S. 658), the Commission required the Virginian to establish through rates to the west via appellant's line as well as that of the Norfolk; but before this came to be done the movement of Virginian coal westbound via Matoaka and the Norfolk had already developed as a result of the absence of through rates via appellant's line, and such movement still continues in considerable volume (R. 237-8).

The record establishes that the proposed route via Wharncliffe and the Norfolk would be more economical than the Matoaka route by 14 cents a ton (R. 42), but also that the route via Gilbert and appellant's Logan Subdivision would exceed in economy the Norfolk's proposed Wharncliffe route by 90 cents a car exclusive of fixed charges and interest on construction cost (R. 42, 43). The significance of these facts should be emphasized. It is of course apparent that the Gilbert-Wharncliffe route for westbound coal can be used only in connection with the new line of the Virginian from Itmann to Gilbert. The superior economy of the Gilbert-Wharncliffe route over the Matoaka route is thus rendered possible solely by this new construction of the Virginian's. But this construction also and necessarily brings into existence a *third* route, via the Logan Sub-division, which is more economical than either the present route via Matoaka or the proposed Gilbert-Wharncliffe route; so that, in appellant's view, the phenomenon thus is presented that the same construction—the Itmann-Gilbert line—which, under different facts, might bring justification to the proposed Gilbert-Wharncliffe line operates simultaneously to deny that justification.

There are twenty-seven mines in the territory about

Itmann that are served jointly by the Virginian and appellant (R. 171). These mines can ship coal to the west either via the Virginian-Matoaka-Norfolk route or via appellant's line through Prince and Deepwater (R. 171). During the first nine months of 1927, 971,885 tons, constituting 43.84% of all shipments, moved from these joint mines via appellant's Deepwater route (R. 172), and the record is innocent of any evidence either (1) that the two-line haul via Wharncliffe is any more economical than the one-line haul via Deepwater, or (2) that appellant would refuse to make through rates from these mines via the Virginian's new Itmann-Gilbert line and its own Logan Subdivision.

The question here, therefore, is whether the Gilbert-Wharncliffe line can be validly authorized because furnishing a route more economical than the Norfolk's Matoaka route, when every ton of coal that now uses the Matoaka route and could use the Wharncliffe route, could also use either the route via Gilbert and the Logan Subdivision (which is proved to be more economical than the Wharncliffe route) or the Deepwater route (which is not shown to be less economical than the Wharncliffe route).

(c) As to Exploitation of Pocahontas Coal.

The Norfolk owns all of the capital stock of the Pocahontas Coal Company, which is the owner of 365,000 acres of coal lands (R. 51), 82,500 of which lie in the Guyandot Valley (R. 56).

The main purpose of the Norfolk in acquiring the holdings of the Pocahontas Coal Company was the suppression of competition on the part of other railways in

the Pocahontas field by enabling the Norfolk, so far as possible, to see to it that these areas should be served by it and not by any competing carrier (R. 207-8).

In its report, the Commission remarked that "the N. & W. might be disposed to permit the exploitation of the lands of the Pocahontas Company, provided it received the westbound tonnage therefrom at Wharncliffe" (R. 57).

There is no evidence that exploitation of the Pocahontas reserves would be in the public interest, and the Norfolk itself, as the Commission stated in its report, suggested on brief "that the Commission might properly find that there is no present necessity to construct any of the proposed lines, since the bituminous coal industry is now suffering from over-development" (R. 46).

Some part of the Pocahontas lands are already under development, though not served by the Norfolk (R. 37).

Here the question is whether any substantial support for issuance of a certificate of public convenience and necessity can be gleaned from the fact that as a result of the construction authorized the owner of coal lands *might be disposed to permit* their exploitation, where the record is not only devoid of evidence that such exploitation is or will be required in the public interest, but also proves that exploitation of the lands in question is already in progress.

(d) As to Bottling-Up of the Virginian.

Whether, in view of the fact that the sole interest of the Virginian in its westbound traffic from the Guyandot Valley lies in the matter of divisions, new construction can be authorized in order to furnish an additional

western connection with that carrier, is a question which largely depends upon legal construction of the Transportation Act of 1920 and requires for its decision no factual basis except the general rail situation already described.

(e) As to Necessity for a Cross-Line.

The court below, in its opinion, pointed out that there is no cross-line in West Virginia between the line of the Norfolk, lying south of the mountain divide already described, and the lines of the Virginian and appellant, situated on the north of the divide, and concluded "that it is to the public interest within that long distance to have a cross-line for the purpose of carrying freight and passengers of local people from one railway to the other without the necessity of making these long hauls to the Ohio River on one railway and then back up the other when the distance between these railways in these two valleys is so short" (R. 96).

In this finding the court imported a function for the Gilbert-Wharncliffe line which was not ascribed to it by either its proponent or the Commission. In determining whether this finding gives any support to the action of the Commission, this Court must determine whether the finding has any support in the record. This requires consideration of the facts (1) that the Commission found shipments of coal to local points east of Kenova to be negligible (R. 38-9), (2) that the record fails to disclose the existence of any movement of either passengers or merchandise from one valley to the Ohio and thence back to the other valley, and (3) that there is no evidence whatever of any need, or even request, for interchange

between the valleys by rail of either passengers or freight of any character whatever.

(3) The Finding of the Court Below That the Virginian's Itmann-Gilbert Line and the Guyandot's Gilbert-Wharncliffe Line Were Authorized as a Unified Project.

The facts requisite to a review of this finding are the following:

(a) The application of the Guyandot for authority to construct a line from Itmann to Gilbert and thence to Wharncliffe was filed October 29, 1925 (R. 33). The Virginian at first joined in this application, but on December 24, 1925, withdrew this concurrence, and more than a year later, on January 21, 1927, filed its own application for the Itmann-Gilbert line, describing the same as "a line of railroad extending from a connection with the Guyandot River branch of the Virginian Railway at or near Itmann, down the Guyandot River to a connection with the Chesapeake & Ohio at or near Gilbert," without reference to any construction proposed by the Guyandot (R. 33). The report of the Commission shows that the Virginian took the position that "the natural and economical routes for traffic from the proposed line are eastbound over the Virginian and westbound over the C. & O." (R. 47).

(b) The two applications referred to, as well as that filed by appellant, were heard together and disposed of in one report. The report is devoid of any statement that the authorization of the Virginian's line was con-

tingent upon construction of the Guyandot's line. The reason for granting the Virginian's application was stated to be that it "will insure supplying the necessary connection between the lines on the upper and lower Guyandot", thus evidently referring to the lines then in existence and mentioned in the Virginian's application and not to the Guyandot's line which it had, at that point in its report, not determined to authorize and which will lie on neither the upper nor the lower Guyandot (R. 56-7). When the report came to deal with the Guyandot line, it countenanced its construction on the ground that it would afford competition between the Norfolk and the appellant, without any reference to any dependence of the Virginian's line upon its construction.

(c) The Commission first disposed of all three applications by its order of July 23, 1928, wherein it required that the two lines be completed on or before the same date, December 31, 1931 (R. 240). The order did not show any dependence of the authority granted the Virginian upon that granted the Guyandot; and by a subsequent order of October 20, 1928, the Commission left in effect its authority for the Virginian's line, at the same time suspending for reconsideration its authority for the Guyandot's line (R. 243).

III.

SPECIFICATION OF THE ASSIGNMENTS OF ERROR TO BE URGED.

The eight Assignments of Error in this case (R. 98-101) are printed in the Appendix to this brief, pages ix-xii. All are relied upon. They challenge the validity of the authorization of the Gilbert-Wharncliffe line by the Commission upon the respective grounds stated therein, which, summarily stated, are: (1) that neither the findings of the Commission and the court nor the evidence in the record afford any substantial support for the Commission's order; (2) that the record proves the construction complained of in this suit to be contrary to the public interest and to have been authorized under an erroneous theory of the applicable law; and (3) that the decision of the court below that authority for the Virginian's Itmann-Gilbert line was contingent upon construction of the Guyandot's Gilbert-Wharncliffe line was erroneous because squarely in conflict with conclusive proof to the contrary. Accordingly, each of the Assignments is urged upon the Court on this appeal.

IV.

SUMMARY OF ARGUMENT.

(NOTE: The points embraced in divisions 3 and 4 of this summary will, in the interest of ultimate brevity, be treated in full at this point. They require discussion which would be brief in any event and cannot readily be shortened by summary statement. Moreover, their full disposition here will dispose, in the main, of all controversies having primarily to do with facts, and will leave for further argument only the principles of law upon which appellant rests its case.)

1. AN ORDER UNSUPPORTED BY SUBSTANTIAL EVIDENCE IS VOID.

A certificate of public convenience and necessity authorizing new railroad construction is void and without effect unless supported by substantial evidence that the new facilities are required by a strong and urgent public need. *Interstate Commerce Commission* v. *L. & N. R.R. Co.* (1913), 227 U. S. 88, 91-4; *Chicago, R. I. & P. Ry. Co.* v. *United States* (1927), 274 U. S. 29, 33; *United States* v. *Abilene & So. Ry. Co.* (1924), 265 U. S. 274, 288; *Chicago Junction Case* (1924), 264 U. S. 258, 265-6; *Public Convenience Application of Utah Terminal Ry.* (1922), 72 I. C. C. 89, 93-4.

2. THE COMPETITIVE CONSIDERATIONS UPON WHICH ALONE THE COMMISSION RESTED ITS AUTHORIZATION OF THE GILBERT-WHARNCLIFFE LINE GIVE NO SUPPORT TO ITS ORDER AND CAN HAVE BEEN RELIED UPON ONLY UNDER A MISCONCEPTION OF THE THEORY AND PURPOSE OF THE TRANSPORTATION ACT OF 1920.

In the enactment of the Transportation Act of 1920, 41 Stat. L. 456, U. S. C. A., Title 49, and of other laws enacted in the exercise of the power to regulate commerce between the several States, it was the purpose of Congress, as declared by this Court and heretofore recognized by the Commission, to develop and maintain for the people of the United States an adequate railroad system; and to that end it is recognized by Congress that the preservation of the earning capacity and the conservation of the financial resources of existing individual carriers are matters of national concern; that the unnecessary construction by one carrier of a line of railroad into territory already adequately served by another carrier involves a waste of these resources the burden of which will fall upon the public, and is inimical to the public interest; and that the mere securing to one carrier, by the construction of a new line of railroad, of the right to compete with another carrier, and the mere provision, by such construction, of competitive service for shippers, do not, in and of themselves, justify a finding of public convenience and necessity. This purpose of Congress is especially exemplified by the provisions of paragraphs (18)-(20), inclusive, of Section 1 of the Interstate Commerce Act, which must govern the Com-

mission in its disposition of applications for certificates of public convenience and necessity.

While it is manifestly true that construction of the Guyandot's proposed line from Wharncliffe to Gilbert across the mountain divide between those points would place the Norfolk in physical connection with the Virginian at or near Gilbert, and would, as the Commission found, enable the Norfolk to compete with appellant for westbound business from the Guyandot Valley, thus affording competitive service to shippers in that region, it is likewise true, and appears from the report of the Commission, that the Logan Subdivision of appellant, affording a down-grade to the West, is capable of handling far more economically the westbound traffic which the new line of the Virginian could deliver at Gilbert, and the record shows no request by, or need on the part of, any shipper for the competitive service which would be rendered by the Gilbert-Wharncliffe line. It is apparent, therefore, that the construction here sought to be enjoined would merely duplicate existing, adequate, and more economical facilities and would depend for its traffic upon what it could divert from appellant's superior route. Under such circumstances, the competitive considerations relied upon by the Commission, far from supporting a finding of public convenience and necessity, constitute positive reasons against authorization of the Gilbert-Wharncliffe line; for beyond the facts that competitive facilities are not necessary merely because they are competitive and that competition between carriers may result in harm to the public as well as in benefit, lies the mandate of Congress that duplication of facilities for purely competitive purposes shall cease.

(1922), 257 U. S. 563, 582, et seq.; *New England Divisions Case* (1923), 261 U. S. 184, 189-90; *Dayton-Goose Creek Case* (1924), 263 U. S. 456, 478; *Railroad Commission* v. *Sou. Pac. Co.* (1924), 264 U. S. 331, 347; *Texas & Pac. Ry.* v. *Gulf, etc., Ry.* (1926), 270 U. S. 266, 277-8; *Construction of Lines in Eastern Oregon* (1926), 111 I. C. C. 3, 45, 51; *Public Convenience Application of Utah Terminal Ry.* (1922), 72 I. C. C. 89, 93-4, *supra.*

3. THE ADDITIONAL FINDINGS OF THE COURT BELOW GIVE NO SUPPORT TO THE ORDER.

(Complete Discussion)

Authorization of the Gilbert-Wharncliffe line finds no support in the additional facts regarded by the court below as imparting validity to the action of the Commission, because—

(a) The Proposed Line Is Neither Necessary nor Convenient as a Means of Access to Gilbert and Horsepen Creek Coal.

The record proves that as a means of access to coal deposits on Gilbert and Horsepen Creeks the Guyandot's proposed line is wholly unnecessary and inconvenient,—unnecessary in that this coal can be reached from either the appellant's or the Virginian's line with equal facility, and inconvenient in that the resulting haul, traversing a mountain divide and involving a greater distance to all common points, would be uneconomical and burdensome alike to commerce and the public generally.

There can be no doubt that where the opening of nat-

ural resources is properly relied upon as an argument for the public convenience or necessity of a proposed line of railroad, there must be involved a conception of those resources as peculiarly available for development over that line. Such a conception is not possible in the light of the facts as to Horsepen or Gilbert Creek coal in relation to the Gilbert-Wharncliffe line. It cannot be persuasively urged that the public interest requires that the Norfolk build a branch line ten and a half miles long across a mountain at a cost of $2,500,000 as preliminary to building a second branch line five miles long at a cost of $600,000 in order to reach coal deposits which can be reached with infinitely less difficulty from the existing line of appellant and/or the authorized line of the Virginian, both affording shorter and far more economical routes.

The Commission itself was urged to consider the future coal traffic possibly to be developed by the Gilbert-Wharncliffe line as a consideration supporting authorization of its construction. Doubtless it was the circumstances just described which prompted the Commission not to rely upon the Gilbert or Horsepen coal deposits as justifying its certificate, but, on the contrary, to content itself with the casual statement that "ultimately it [the proposed line] would develop some coal traffic"—a statement that could probably be made with equal truth of any line constructed anywhere in or near the Guyandot or Tug River Valleys. It will not be suggested that this phrase implies that "strong and urgent public need" which constitutes the Commission's approved definition of public convenience and necessity.

(b) Operating Economies of the Proposed Line Compared With the Matoaka Route Are Irrelevant Because of the Still Greater Economies of Appellant's Line.

The operating economies afforded by the Gilbert-Wharncliffe line as compared with the Matoaka route are wholly irrelevant by reason of the fact that the route via Gilbert and appellant's Logan Subdivision affords still greater economies and is wholly adequate to transport the entire tonnage. A new railroad cannot be justified simply because there are worse routes than the one it will afford. *Non constat* but that, as in this case, there are better, adequate, and more economical routes. The superior economy of the Gilbert-Wharncliffe route over the Matoaka route can acquire relevancy only through indulgence of the assumption that the coal in question *must* move over *some* Norfolk and Western route,—an assumption grounded in fallacy, for public interest requires use of the economical and natural route and is hardly concerned with the private desire of the Norfolk to participate in this traffic. The Court will recall (ante, p. 21) that participation in this traffic by the Norfolk's Matoaka route had its genesis in the refusal of the Virginian to publish joint rates via appellant's line, and that establishment of such rates was ultimately compelled pursuant to a decision of this Court.

As for shipments from the twenty-seven mines served jointly by the Virginian and appellant, it is true that appellant has a one-line haul from these mines to the West via Deepwater and would, therefore, not be compellable to publish through rates via the Virginian's Itmann-Gilbert line and its own Logan Subdivision. There is, however, no proof that appellant would avail itself of the

short-haul provision of the Act and decline to open the new route to these mines; but even if we assume, for sake of the argument, that the interest of appellant will dictate such refusal, still we submit that there is no proof of either convenience or necessity that the Gilbert-Wharncliffe line be available to these mines.

In the first place, there is no necessity that the coal from these mines move over the Norfolk at all, for appellant's Deepwater route is available to the whole traffic, and not one syllable of testimony tends to show any economy in the two-line Virginian-Wharncliffe-Norfolk route as compared with the one-line haul over appellant's line via Deepwater. This appears conclusive, for 43.84 per cent of the coal from these joint mines already moves via Deepwater, and there is no suggestion of a reason why it all may not do so with entire conformity to public convenience and necessity.

In the second place, even if appellant *should* refuse to open the route via Gilbert and the Logan Subdivision, it would do no more than rely upon its legal right under the Interstate Commerce Act,—the same Act, be it noted, that prohibits unnecessary railroad construction. To hold new construction necessary under the Act because it will quiet apprehension that a carrier will avail itself of rights vested in it by the self-same legislation smacks of the theory that Congress would permit one provision of the law to be nullified in order to avoid the effect of a different provision of the same law.

And in the third place, the Commission, a body peculiarly acquainted with the intricacies of rate adjustments and their effect upon freight movements, did not find the joint mine situation worthy of mention as a reason supporting its action. Since all the facts concerning

these mines were urged upon that body as warranting the Gilbert-Wharncliffe line, its silence in respect thereto is a practical, if not a technical, finding against the sufficiency of these facts as support for its order.

(c) The Proposed Line Is Not Necessary to the Exploitation of Pocahontas Coal, and Such Exploitation Is Shown to Be Against Rather Than Conducive to the Public Interest.

Concerning the holdings of the Pocahontas Company in the Guyandot Valley, the court below stated that "the I. C. C. evidently reached the conclusion that by the burden of the ownership of this large body of land for this great length of time, certain rights accrued to the N. & W., and in our opinion *equity, at least,* requires agreement with such conclusion" (R. 95).

It may readily be questioned whether ownership by a carrier of coal lands acquired for the avowed purpose of *suppressing competition* can consistently be held to confer an equitable right to invasion of territory adequately served by other carriers through construction of a line authorized by the Commission solely on the ground that *competition would be created or increased.* But this question is not relevant; for plainly the court below, in suggesting that an equitable claim was conferred upon the Norfolk by the burden of the ownership of these lands, looked rather to the private interest of the Norfolk than to the interest of *the public,* which is the sole criterion under the law.

But there is no justification for the statement that the Commission attached any weight to the Pocahontas holdings. The Commission is required by law, before issuing

a certificate of public convenience and necessity, to find that the new construction *is* or *will be* required in the public interest. (Interstate Commerce Act, Sec. 1 (18)-(20)). This provision cannot be complied with by a finding of vague possibilities. Hence even if we were to concede, which we by no means do, that encouragement to the Norfolk to permit exploitation of coal reserves owned by it would be a valid reason for authorizing the proposed line, such authorization cannot be lawfully predicated upon the inconclusive suggestion that "the N. & W. *might be disposed to permit* the exploitation of the lands of the Pocahontas Company." (R. 94; italics supplied.) *Non constat* but that the N. & W. might not be disposed to permit such exploitation. Clearly this adumbration of less than a probability was not, and cannot be, considered a substantial basis for an order. In any event, the suggestion that construction of the proposed line is necessary for exploitation of Pocahontas holdings in the Guyandot Valley is disposed of by the fact (R. 37) that large acreages of those holdings are already under development though not served by the Norfolk.

But aside from this, the record signally fails to show that such exploitation of the Pocahontas reserves would be in the public interest. Rather is it suggested by the record, and the assertions of the Norfolk itself, that further development of these reserves may be contrary to the public interest. *For, as the Commission points out, the Norfolk "suggests in its brief that the Commission might properly find that there is no present necessity to construct any of the proposed lines, since the bituminous coal industry is now suffering from over-development"* (R. 46).

Addressing himself to this question, Commissioner Porter pertinently observed:

> "In this case the majority conceive, even before the Virginian's line is built, that another carrier will be 'required' in the public interest to serve this territory. In this conception they rely, not upon the claim of any prospective shipper, or shippers, but apparently upon the theory that competitive service might prove desirable and with a *hint* that construction of the line by the Norfolk & Western might induce it 'to permit the exploitation of the lands of the Pocahontas Company, provided it received the west-bound tonnage therefrom at Wharncliffe.'
>
> "On the question of competition I agree wholeheartedly with the remarks of Commissioner Woodlock in the *Oregon Case* which I have quoted. If 'exploitation' of the Pocahontas Company coal lands is to be dependent upon haulage of the coal by the Norfolk & Western, *it may be that its exclusion from this territory will have the wholesome effect of avoiding the over-production suggested by this carrier on brief as a possible reason for denying all of the applications.*" (R. 63.)

(d) The Virginian Will Not Be Bottled Up by Absence of the Proposed Line Because Its Only Interest in Westbound Traffic—Divisions—Is Controlled by the Commission.

To the contention endorsed by the court below that the Gilbert-Wharncliffe line is necessary to prevent the bottling-up of the Virginian by having only one effective western outlet, the all-sufficient answer is that the sole interest of the Virginian in its westbound traffic from the Guyandot Valley is the matter of divisions of

the through rates, and the matter of divisions is entirely in the hands of the Commission under Section 15 (6) of the Act (Appendix, pp. vii-viii), which empowers the Commission, upon its own motion or upon complaint, to prescribe just, reasonable and equitable divisions among carriers participating in the traffic. That this power is an integral and vital part of the balanced structure of governmental power whereby the Commission is enabled, among other things, to prevent unnecessary construction and at the same time forestall injustice to carriers situated as is the Virginian, is established by the *Dayton-Goose Creek Case* (1924), 263 U. S. 456, *supra*, and the *New England Divisions Case* (1923), 261 U. S. 184, *supra*, in the last-named of which, the court said:

> "Transportation Act, 1920, introduced into the federal legislation a new railroad policy. *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R.R. Co.*; 257 U. S. 563, 585. Theretofore, the effort of Congress had been directed mainly to the prevention of abuses; particularly, those arising from excessive or discriminatory rates. The 1920 Act sought to ensure, also, adequate transportation service. That such was its purpose, Congress did not leave to inference. The new purpose was expressed in unequivocal language. And to attain it, new rights, new obligations, new machinery, were created. The new provisions took a wide range." (p. 189.)

After thus stating the general purposes of the Act, and with specific reference to control by the Commission over divisions, the Court *related the exercise of this power to the accomplishment of these purposes*, saying:

"It is true that Sec. 12 of the Act of June 18, 1910, c. 309, 36 Stat. 539, 551, 552, which first conferred upon the Commission authority to establish or adjust divisions, did not, in terms, confer upon the Commission power to act on its own initiative. The language of the act seemed to indicate that the authority was to be exercised only when the parties failed to agree among themselves, and only in supplement to some order fixing the rates. The extent of the Commission's power was a subject of doubt; and Transportation Act, 1920, undertook by Sec. 15 (6) to remove doubts which had arisen. *But Congress had, also, the broader purpose explained above.* This is indicated, among other things, by expressions used in dealing with joint rates. By new Sec. 15 (6), p. 486, the Commission is directed to give due consideration, in determining divisions, to 'the importance to the public of the transportation services of such carriers'; just as by new Sec. 15 (3), page 485, the Commission is authorized upon its own initiative when 'desirable in the public interest' to establish joint rates and 'the divisions of such rates'." (pp. 194-5.)

Moreover, to permit construction of the Gilbert-Wharncliffe line in order to assure ample divisions for the Virginian would not be conducive to equitable divisions—for such the Commission is required in any event to prescribe—but, if it had any effect in this connection, could only be conducive to acquiescence by competing connections in divisions allowing to the Virginian more than its just proportion of through rates. And in any view, this construction would be such as was intended by the Act to be rendered unnecessary by Section 15 (6) and prevented by Section 1 (18)-(20), and would mark a reversion to the outgrown and wasteful

competitive construction completely condemned by the policy of the law as declared in the statute and announced by this Court.

(e) There Is No Evidence of Either Need or Desire for the Proposed Line as a "Cross-Line" for Local Exchange.

The holding of the court below that the Gilbert-Wharncliffe line is required in the public interest because furnishing a cross-line between the Guyandot and Tug River Valleys available for local exchange of freight and passengers, is without support in even a scintilla of evidence that any such exchange would take place, or that, if it would, the public interest requires it. Not one shipper or resident requested the new construction as a bridge for local exchange. Not one witness testified to any need for such exchange. Therefore, if the assumption is indulged that this exchange will take place, the further assumption is warranted that this need is amply cared for by other means than rail transportation.

But pure assumption cannot establish a public need commensurate with the cost of the Gilbert-Wharncliffe line. The Commission ignored this cross-line consideration, and in adopting it the lower court reached beyond anything in the evidence to adduce a reason for its decision. With due respect, we submit that a court's finding unsupported by evidence can have no greater validity than an equally unsupported finding of the Commission.

4. THE ITMANN-GILBERT LINE WAS AUTHORIZED BY THE COMMISSION INDEPENDENTLY OF THE GILBERT-WHARNCLIFFE LINE AND THE LATTER WAS REGARDED AND TREATED AS A SEVERABLE PROJECT.

(Complete Discussion)

The point mainly stressed by the lower court in its opinion is that the Itmann-Gilbert line of the Virginian and the Gilbert-Wharncliffe line of the Norfolk were regarded and authorized by the Commission as a unified project and that if the court were to enjoin the Gilbert-Wharncliffe line it would, in effect, substitute its judgment for that of the Commission and permit the creation of a rail situation never contemplated by the body vested with control of new railroad construction. That this point is without foundation in fact, the record establishes to the point of demonstration.

If it were true that the Commission predicated its authority for the Itmann-Gilbert line upon a condition that the Gilbert-Wharncliffe line be constructed, there would be an end of the case, for we do not contend that the courts may dismember a unified and interdependent construction program authorized by the Commission. But it is not true. Neither the report nor the order of the Commission so states, and the finding of the court is based upon inference only (see R. 87-9). But the inference is, as we shall see, neither natural nor reasonable, and one circumstance in particular shows it to be impossible.

It is not a natural inference. While, as the court remarked, the several applications were heard together

and disposed of in one order, nothing else was to be expected when the three applications involved substantially identical lines in the Guyandot Valley and when all parties conceded that but one should be built. While, moreover, as the court also said, the Itmann-Gilbert line and the Gilbert-Wharncliffe line were required to be completed by the same date, this neither requires nor justifies any such inference as that the Gilbert-Wharncliffe line was a prerequisite to the Itmann-Gilbert line. Specification of the same date for completion of the two lines is plainly referable to the undeniable fact that the Gilbert-Wharncliffe line (which is shorter and presumably capable of earlier completion) would be useless without the Itmann-Gilbert line and therefore need not be completed first.

But the court's inference of a unified project is not only not a *natural* one; it is not a *reasonable* one, for the following reasons:

(1) The report shows that the applications of the several companies in the several proceedings were filed independently, at widely varying times, and in each case for the purpose of securing certificates for the respective applicants (and/or their parent companies) alone (R. 32-3).

(2) The report shows that the Virginian's application was for a line *forming a connection with appellant* at or near Gilbert, no mention being made of a connection with the proposed line of the Norfolk (R. 33).

(3) The report shows that the Virginian took the position that "the natural and economical routes for traffic are eastbound over the Virginian *and westbound over the C. & O.*" and that in line with this position the Vir-

ginian suggested an exchange of trackage rights with appellant (R. 47).

(4) The report shows that the new line of the Virginian was treated as complete and sufficient in and of itself, the reasons for the grant of a certificate to it being thus summarized (R. 56-7):

> "The Virginian needs its proposed line in order to have greater independence in the matter of an outlet for westbound coal. It appears that it can have no suitable outlet to the west except down Guyandot River, and it is not desirable to put the ownership of the line through this narrow mountain valley or gorge under the control of one of its competitors. Trackage rights for overhead business would diminish, but not remove this objection. *The grant of a certificate to the Virginian will insure supplying the necessary connection between the lines on the upper and lower Guyandot at a minimum cost of construction*, and operation by the Virginian of the proposed line should tend to some economies in the cost of handling eastbound freight as compared with operation by the other applicants. Multiple operation of the line by the three applicants would not tend to economy or efficiency. The people of the local territory prefer the Virginian for reasons that appear to be sound. So far as the question of priority intervenes, the Virginian's claim appears at least as good as any others."

(5) In the event of a unified project it is customary for the order of the Commission to show the interdependence of the authorities granted. (See, for example, form of order entered in *Construction of Lines in Eastern Oregon* (1926), 111 I. C. C. 3, 58-60, *supra*.) No such indication exists here, and no one would have the

hardihood to assert that if the Norfolk declined to accept its certificate, that in favor of the Virginian would be avoided.

But we do not stop with showing the inference of a unified project to be *unnatural* and *unreasonable*. The following single fact proves it to be *impossible:*

On October 20, 1928, after having for a time postponed the effective date of its original order in its entirety, the Commission permitted its authorization of the Virginian's Itmann-Gilbert line to go into effect, at the same time continuing the suspension of its authority for the Norfolk's Gilbert-Wharncliffe line. The order reads:

> "Upon further consideration of the record in the above entitled proceedings, and of the further petition of the Chesapeake & Ohio Railway Company for reconsideration and reargument:
>
> "It is ordered, That the effective date of the certificate and order issued in these proceedings on July 23, 1928, be and it is hereby, *further postponed* to November 22, 1928, *except* in so far as said certificate and order authorizes the Virginian & Western Railway Company to construct a line of railroad in Wyoming and Mingo Counties, W. Va." (R. 243.)

It is not often that the point mainly relied upon by the lower court in its opinion can be so clearly shown to be error. The lower court says that from the facts of joint hearings, a single order, and an identical date for completion, it is inferable that the Commission authorized the Itmann-Gilbert line only if the Gilbert-Wharncliffe line be built. *But the Commission itself, in the order just quoted, says that it would permit the Virginian's line to be built whether or not the Gilbert-Wharncliffe line be built.* And there, surely, is an end of the matter.

5. THE PROPOSED CONSTRUCTION WILL INVADE THE PRIVATE LEGAL RIGHT OF APPELLANT TO PROTECTION FROM UNNECESSARY COMPETITIVE CONSTRUCTION.

Construction of the Norfolk's line from Gilbert to Wharncliffe, being without authority in law and authorized by a void act of the Commission, invades a legal right vested in appellant by the provisions of the Transportation Act of 1920 to protection from invasion of its territory and diversion of its traffic by unnecessary and wasteful competitive construction. *Piedmont & N. Ry. Co.* v. *United States* (1930), 280 U. S. 469, 478; *Chicago Junction Case* (1924), 264 U. S. 258, *supra;* and *Texas & Pac. Ry.* v. *Gulf, etc., Ry.* (1926), 270 U. S. 266, *supra.*

V.

ARGUMENT.

A—THE FINDINGS OF THE COURT BELOW.

The foregoing summary statement of the argument is respectfully submitted as sufficient in itself to demonstrate the inadequacy of the facts cited by the lower court but ignored by the Commission in its report as justification for the Gilbert-Wharncliffe line. Where those facts had to do with origination of traffic by the proposed line (Summary, Sec. 3 (a), ante, p. 32), it has been shown that the traffic in question can be more easily and economically developed by other lines. Where operating economies have been attributed to the Gilbert-Wharncliffe line, we have proved that greater economies still will result from the use of other existing and/or

authorized lines, and that this evidence is therefore irrelevant. (Summary, Sec. 3 (b), ante, p. 34) The conclusions that the finding of public convenience and necessity for the line might be postulated upon encouragement to land owners to exploit coal deposits controlled by them, or upon facilitation of local traffic exchange between the Guyandot and Tug River Valleys, have been shown to be assumptions unwarranted by any proof of public need or desire for such exploitation or such exchange. (Summary, Sections 3 (c) and 3 (e), ante, pp. 36, 41.) And as for public necessity for the line as a western outlet for the Virginian, we have shown that the appellant's line is fully adequate to transport all the traffic the Virginian could deliver at Gilbert, that the Virginian's only interest in its westbound traffic lies in divisions of through rates, and that such divisions are controlled by the Commission under provisions of law which, along with other provisions concerning new construction, go to make up that body of regulatory measures which constitutes the Transportation Act of 1920, and which purposed, *inter alia*, to prevent necessity for new construction arising from precisely such situations as that in which the Virginian finds itself. (Summary, Sec. 3 (d), ante, p. 38)

The summary statement (Sec. 4, ante, pp. 42-45) is also relied upon, without more, as establishing that the holding of the lower court that the Virginian's line and that of the Guyandot were authorized by the Commission as a unified project is erroneous for the reasons there given, and especially because squarely in the teeth of the action of the Commission itself in severing its authority for the Virginian's line from that for the Guyandot's

line, and permitting the first to take effect pending its reconsideration of the second.

B—THE FINDINGS OF THE COMMISSION.

Since, accordingly, the reasons supplied by the court to support the Commission's order fail to have that effect, the only facts which need be further considered are those upon which the Commission predicated its action, to-wit, that competition between the Norfolk and appellant will result from construction of the Guyandot's line, and that competitive service will be afforded shippers in the Guyandot Valley. That competition between carriers and competitive service to shippers will result as a necessary consequence of the invasion of appellant's proper territory by the line of another carrier is quite undeniable; and it follows from this that appellant's case depends, from this point, upon no controverted matters of fact, but upon the following propositions of law: (1) an order of the Commission authorizing new construction is void unless supported by substantial evidence (Summary, Sec. 1, ante p. 29); (2) competition between carriers, and competitive service to shippers, are facts which, unaccompanied by any proof of public necessity, give no support to a certificate of authority for new construction, and an order can be based solely upon these facts only under an erroneous conception of the applicable law (Summary, Sec. 2, ante p. 30); and (3) the invasion of appellant's territory and the diversion of appellant's traffic by new construction not validly authorized impinges upon the private right of appellant to protection from purely competitive construction not required in the public interest (Summary, Sec. 5, ante p. 46).

1—The Action of the Commission in Authorizing Construction of the Gilbert-Wharncliffe Line Is Void Unless Supported by Substantial Evidence.

That the law imperatively requires, in order to give validity to an order of the Commission, not merely some evidence, but substantial evidence in support thereof, is made certain by decisions of this Court.

In *Interstate Commerce Commission* v. *L. & N. R.R. Co.* (1913), 227 U. S. 88, *supra,* where it was attempted to enjoin the enforcement of an order of the Commission fixing rates, the government's contention was that, although a rate-making order could be entered only after a hearing had been accorded the parties, nevertheless such an order when made was conclusive upon the parties. But the Court took a different view, pointing out that "a finding without evidence is arbitrary and baseless", and observing that "if the government's contention is correct, it would mean that the Commission had a power possessed by no other official, administrative body, or tribunal under our government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat." After characterizing such power as "inconsistent with rational justice", the Court continued:

> "As these contentions of the government must be overruled, it is necessary to examine the record with a view of determining whether there was *substantial evidence* to support the order." (p. 94.)

And in *Chicago, R. I. & P. Ry. Co.* v. *United States* (1927), 274 U. S. 29, *supra,* where the Court reviewed

proceedings to fix maximum rail-and-water rates, it was said:

> "If the order of the Commission be unsupported by the evidence, it is, of course, void. *New England Divisions Case*, 261 U. S. 184, 203. But if the determination of the Commission finds *substantial support* in the evidence, the courts will not weigh the evidence nor consider the wisdom of the Commission's action." (pp. 33-4.)

No extended discussion is necessary in support of a principle universally recognized, but we may further call attention to *United States* v. *Abilene & So. Ry. Co.* (1924), 265 U. S. 274, 288, *supra*, holding that "a finding without evidence is beyond the power of the Commission", and to the *Chicago Junction Case* (1924), 264 U. S. 258, 265-6, *supra*, where the Court said that "to make an essential finding without supporting evidence is arbitrary action".

We have demonstrated already that the sole substantial consideration appearing from the evidence or found by the Commission in support of the action here complained of is the circumstance that construction of the Norfolk's proposed line will afford an additional and competitive route to the West for coal shipped from the Guyandot Valley. We shall now undertake to show that it is an erroneous conception of the law which permits new construction because of this fact alone. If in this contention our position is sound, then it is clearly past all argument that an injunction should issue upon the principle of the authorities above referred to.

2. Only Under a Misconception of the Theory and Purpose of the Transportation Act Can a Certificate of Public Convenience and Necessity for New Construction Be Based Upon a Naked Finding That Competition Between Carriers and Competitive Service to Shippers Will Result.

In its petition herein, to the end that its position in this matter might be clear to the Court, appellant alleged, *inter alia,* that in the enactment of the Transportation Act of 1920, and particularly of paragraphs (18)-(20) of section 1 of the Interstate Commerce Act, it was the purpose of Congress, as declared by the Supreme Court and heretofore recognized by the Commission, to develop and maintain for the people of the United States an adequate railroad system; and that to this end it was recognized by Congress that the preservation of the earning capacity and the conservation of the financial resources of existing individual carriers are matters of national concern; that the unnecessary construction by one carrier of a line of railroad into territory already adequately served by another carrier involves a waste of these resources, the burden of which will fall upon the public, and is inimical to the public interest; and that the mere securing to one carrier by the construction of a new line of railroad, of the right to compete with another carrier, and the mere provision, by such construction, of competitive service for shippers, do not in and of themselves justify a finding of public convenience or necessity in respect of such new construction.

In appraising these allegations it is pertinent to have in mind the development leading to the enactment of the Transportation Act, concisely described as follows by

Mr. Chief Justice Taft, speaking for a unanimous Court in *Wisconsin R.R. Comm.* v. *C. B. & Q. R.R. Co.* (1922), 257 U. S. 563, *supra:*

"The Interstate Commerce Act of 1887, 24 St. 379, was enacted by Congress to prevent interstate railroad carriers from charging unreasonable rates and from unjustly discriminating between persons and localities. The railroads availed themselves of the weakness and cumbrous machinery of the original law to defeat its purpose, and this led to various amendments culminating in the amending Act of 1910, 36 Stat. 539, in which the authority of the Commission in dealing with the carriers was made summary and effectively complete. Whatever the causes, the fact was that the carrying capacity of the railroads did not thereafter develop proportionately with the growth of the country, and it became difficult for them to secure additional investment of capital on feasible terms. When the extraordinary demand for transportation arose in 1917, the Congress and the President concluded to take over all the railroads into the management of the Federal Government, and by joint use of facilities, which the Anti-Trust Law was thought to forbid under private management, and by use of Government credit, to increase their effectiveness. This was done by appropriate legislation and executive action under the war power. From January 1, 1918, until March 1, 1920, when the Transportation Act went into effect, the common carriers by steam railroad of the country were operated by the Federal Government. Due to the rapid rise in the prices of material and labor in 1918 and 1919, the expense of their operation had enormously increased by the time it was proposed to return the railroads to their owners. The owners insisted that their properties could not be turned back to them by the Government

for useful operation without provision to aid them to meet a situation in which they were likely to face a demoralizing lack of credit and income. Congress acquiesced in this view. The Transportation Act of 1920 was the result." (pp. 582-4.)

Describing in a general way the purposes of the Act, the Chief Justice, after stating that Congress sought to avoid the accrual of excessive incomes to the carriers better circumstanced by recapturing and using the excess for loans to the others and for other purposes, pointed out that the Act further put under the control of the Commission, "1st, the issuing of future railroad securities by the interstate carriers; 2nd, the regulation of their car supply and distribution and the joint use of terminals; and 3rd, *their construction of new lines,* and their abandonment of old lines". (p. 585.) Continuing, the opinion was expressed in the following significant language:

"It is manifest from this very condensed recital that the act made *a new departure. Theretofore,* the control which Congress through the Interstate Commerce Commission exercised was primarily for the purpose of preventing injustice by unreasonable or discriminatory rates against persons and localities, *and the only provisions of the law that inured to the benefit of the carriers* were the requirement that the rates should be reasonable in the sense of furnishing an adequate compensation for the particular service rendered and the abolition of rebates. The new measure imposed *an affirmative duty* on the Interstate Commerce Commission to fix rates and *to take other important steps to maintain an adequate railway service for the people of the United States.* This is expressly declared in Sec. 15a to be one of the purposes of the bill." (p. 585.)

The general purposes of the Transportation Act are unequivocally stated in the Act itself, thus: to enable the carriers "properly to meet the transportation needs of the public," 41 Stat. L. 491; to give due consideration to "the transportation needs of the country * * * and the *necessity* * * * of enlarging [transportation] facilities," 41 Stat. L. 488; to "best meet the emergency and serve the public interest," 41 Stat. L. 477; to "best promote the service in the interest of the public and the commerce of the people," 41 Stat. L. 476-7; "that the public interest will be promoted," 41 Stat. L. 482. (See *New England Divisions Case* (1923), 261 U. S. 184, *supra*, at p. 189, footnote 6.)

And these purposes have been plainly declared by this Court in a number of cases now to be considered. In the *New England Divisions Case*, just referred to, where Mr. Justice Brandeis delivered the opinion of the Court, it was recited:

> "Transportation Act, 1920, introduced into the Federal legislation a new railroad policy. *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R.R. Co.*, 257 U. S. 563, 585. Theretofore, the effort of Congress had been directed mainly to the prevention of abuses; particularly, those arising from excessive or discriminatory rates. The 1920 Act sought to ensure, also, adequate transportation service. That such was its purpose, Congress did not leave to inference. The new purpose was expressed in unequivocal language. And to attain it, new rights, new obligations, new machinery, were created. The new provisions took a wide range." (pp. 189-90.)

In the *Dayton-Goose Creek Case* (1924), 263 U. S.

456, *supra*, where the constitutional validity of the recapture clause of the Transportation Act was upheld in an opinion by Mr. Chief Justice Taft, the Court, after citing *Wisconsin R.R. Comm.* v. *C. B. & Q. R.R. Co.* (1922), 257 U. S. 563, *supra*, and the *New England Divisions Case* (1923), 261 U. S. 184, *supra*, said:

> "In both cases it was pointed out that the Transportation Act adds a new and important object to previous interstate commerce legislation which was designed primarily to prevent unreasonable or discriminatory rates against persons and localities. The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, *their construction of new lines*, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged." (p. 478.)

The following language from *Railroad Commission* v. *Sou. Pac. Co.* (1924), 264 U. S. 331, *supra*, is likewise pertinent:

> "The purpose of Congress to *prevent interstate carriers from incurring expense which will lessen*

their ability to perform well their interstate functions is further shown in Sec. 439 of the Transportation Act, whereby the Interstate Commerce Act is amended by insertion of Sec. 20a. This new section subjects to the approval or rejection of the Interstate Commerce Commission the issue by an interstate carrier of all future shares of stock, bonds or other evidence of indebtedness and forbids approval unless the Commission shall find that their issue is for a lawful purpose, is compatible with the public interest, is appropriate and necessary to the discharge of its public duty as a common carrier and will not impair its ability to perform that service. This is of course *in pari materia* with the restriction of paragraph 21 of Sec. 402 to prevent a possible impairment of the financial ability of interstate carriers to discharge their interstate commerce duties." (p. 347.)

The foregoing authorities leave no room for doubt that Congress, in adopting the Transportation Act, radically departed from the policy of the past and imposed upon the Commission the broad duty so to supervise the carriers of the country as to foster an adequate transportation system, viewed from a national standpoint. Conforming to constitutional requirements, Congress set forth in the Act the general principles to be followed by the Commission in attaining this object. In general terms, as said in the *New England Divisions Case* (1923), 261 U. S. 184, *supra*, the Commission is to supervise security issues, car supply and distribution, joint use of terminals, divisions of joint rates, abandonment of old lines, and construction of new lines of railroad. All of these duties are to be discharged with an eye single to the broad purposes of the Act. And with

specific reference to the power to control new railroad construction, the duty of the Commission—which limits its power—is to recognize that only necessary construction which fills a genuine public need should be permitted. It will not suffice that the new construction may increase the revenue, or generally serve the interests of any particular carrier. The transportation system as a whole must be benefited by any construction properly authorized. And it must always be recognized that construction of lines not necessary in the general public interest—however much it may enhance the prospects of a given carrier—involves a waste of financial resources, the burden of which will, in the end, fall upon the public.

These principles—which are fully sustained by the Act itself and by the cases presently to be cited—are to an unusual and peculiar degree applicable in this case, where, we submit, is presented an instance of the very kind of construction which the Act was intended to prevent. Here we have to do with a rugged, sparsely settled country, where the only traffic of real importance is freight, and the freight traffic predominantly in a single commodity, coal. This traffic, as the Commission itself has found, will be economically and adequately cared for by the Virginian's new line and the existing lines of the Virginian and appellant—the only two carriers who have heretofore served this territory. It being found as a fact that all the traffic can readily move by the lines in the Guyandot Valley itself, it is difficult on the face of it to conceive that construction new of an additional line penetrating from other territory could be in the public interest. But when we add that the new line must cross a mountain with grades so steep as to require "doubling", that its cost will approximate $2,500,000, and that op-

eration over it will involve expense greatly in excess of that incurred over existing routes, it becomes manifest that this construction is peculiarly of the character which the Commission, so far from authorizing, was required by law to forbid.

Completely controlling is *Texas & Pac. Ry.* v. *Gulf, etc., Ry.* (1926), 270 U. S. 266, *supra*. There the Santa Fe sought to construct a new line into an industrial district near the city of Dallas, Texas. The district was not theretofore reached by any of its lines, but was being adequately served by the Texas & Pacific. Essentially, therefore, the case is on all fours with this case. The opinion of the Court, which was written by Mr. Justice Brandeis, is almost literally applicable here, and certainly declares the principles controlling in this controversy. We, therefore, invite the closest scrutiny of the following extracts:

> "A truer guide to the meaning of the terms extension and industrial track, as used in paragraphs 18 to 22, is furnished by the context and by the relation of the specific provisions here in question to the railroad policy introduced by Transportation Act, 1920. By that measure, Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; *that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public*

which ultimately bears the loss. See *Railroad Commission* v. *Chicago, Burlington & Quincy R.R. Co.*, 257 U. S. 563; *The New England Divisions Case*, 261 U. S. 184; *The Chicago Junction Case*, 264 U. S. 258; *Railroad Commission* v. *Southern Pacific Co.*, 264 U. S. 331. The Act sought, among other things, to avert such losses." (pp. 277-8.)

We especially emphasize the statement that "competition between carriers may result in harm to the public as well as in benefit", for within the limits of that one declaration is confined the complete refutation of the theory upon which the Commission acted in this case. Obviously if competition may result in harm to the public, then the bare fact that new construction will afford competitive facilities could not, in the nature of things, demonstrate that the new construction is required by public convenience and necessity. And yet, as we have shown, this is the only consideration upon which the Commission grounded its action here complained of.

We quote further from the opinion of the Court:

> "But where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern. *For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest.*" (p. 278.)

Relating the *Texas and Pacific Case* to the instant controversy, Commissioner Porter, in his dissenting expression, made the following accurate observations:

"I am unable to distinguish the facts and the law here under consideration from that dealt with by the Supreme Court of the United States in *Texas & Pac. Ry. v. Gulf, etc., Ry., supra.* It will be recalled that in that case the Santa Fe wished to build a line into an industrial district, 2½ miles west of the city of Dallas, Texas, theretofore not reached by any of its lines but which was being served by the Texas & Pacific. In that case the Santa Fe was seeking to build into new territory, adequately and efficiently served by another carrier. Here the Norfolk & Western is seeking to build into new territory, adequately and efficiently served by other carriers. There, they sought to build a line 7½ miles in length, involving but two small trestles and numerous ordinary fills and cuts. Here they seek to build 10½ miles over a high mountain ridge. There they sought to build at a cost of $500,000. Here they seek to build at a cost of $2,600,000. Here the majority hold that, for competitive reasons, the line may be built. As for me, I prefer to follow the reasoning of the Supreme Court and our own holdings, and deny this construction." (R. 64).

The Commission itself has, in the most striking fashion, demonstrated that it was the purpose of the requirement for certificates of public convenience and necessity to prevent the construction of new railroad facilities solely for competitive purposes. From the 32d Annual Report of the Commission to Congress, dated December 1, 1918, it appears that it was the Commission itself which urged upon Congress the enactment into law of the principle embodied in the requirement of certificates of public convenience and necessity. Thus on page 2 of the Report, the Commission said that "whatever line or policy is determined upon, the fundamental

aim or purpose should be to secure transportation systems that will be adequate for the nation's needs even in time of national stress or peril and that will furnish to the public safe, adequate and efficient transportation at the lowest cost consistent with that service. To this end there should be provisions for * * * (3) *limitation of railway construction to the necessities and convenience of the government and of the public*, and assuring construction to the point of these limitations."

And in the course of hearings before the Committee of the House of Representatives on Interstate and Foreign Commerce held just prior to the return of the railroads to private ownership, when the provisions afterwards incorporated in the Transportation Act were under consideration, Mr. Edgar E. Clark, then a member of the Commission and its representative in this connection before Congress, was called upon by the Committee to express his views concerning the purposes of the proposed enactment. With specific reference to what was afterwards incorporated as section 1 (18)-(20) of the Act, he said to the Committee:

> "The next new provision begins in line 24 on page 8. * * * This is a provision that from and after a date to be fixed by the Congress—
>
> > no carrier by railroad subject to this act shall undertake the extension of its line of railroad or the construction of a new line of railroad, or shall acquire or operate any line of railroad or extension thereof, or shall engage in transportation under this act over or by means of such line of railroad or extension thereof unless it shall first obtain from the Commission a

certificate that the present or future public convenience and necessity require or will require such construction and operation.

"This is followed by a like provision that no carrier by railroad subject to this act shall abandon any portion or all of its line of railroad, or the operation thereof, unless it shall first obtain from the Commission a similar certificate. This is carrying into this act the very well-known provision that applies in some other countries and in some of our States, commonly called the certificate of convenience and necessity. This probably is not as important as it would have been a good many years ago, and it probably will not in the future have as profound effect upon the railroad map as it would have had if it had been in effect 25 years ago; but the idea is *to prevent the building of duplicate lines of railroad* because of keen rivalry of certain financial interests or when the railroads so built will not serve the present or future convenience and necessity, and will simply *depend for traffic upon that which they can get away from railroads already built,* adding to the total burden of maintenance, capital returns, etc., which the public must pay." (Hearings, 66 Congress, p. 14.)

Mr. Clark also stated on the same occasion that:

"The principle underlying this is that a carrier, having been given a franchise to enter a field, ought to be protected against unnecessary and wasteful competition of other and rival carriers, and it ought to be required to cultivate that field to the extent that the public necessity requires." (id., p. 62.)

Commissioner Porter, referring to the finding of the Commission that the provision of a competing route of

itself justifies new construction, said that "this is new and strange doctrine for this Commission to announce as a sole reason for new construction," citing *Public Convenience Application of Utah Terminal Ry.* (1922), 72 I. C. C. 89, *supra*, and *Construction of Lines in Eastern Oregon* (1926), 111 I. C. C. 3, *supra* (R. 61, 58). In the last named case the Commission expressed the general purposes of the Act in the following language:

> "The general principles which are to guide us are not difficult to establish. Congress has undertaken to develop and maintain for the people of the United States, an adequate railroad system. It has recognized that as to individual carriers the preservation of their earning capacity and conservation of their financial resources is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources, and that the burden of this waste may fall upon the public; *that competition between carriers may result in harm to the public, as well as in benefit;* and that, when a railroad inflicts injury upon its rival it may be the public which ultimately bears the loss." (p. 45.)

Employing language specifically applicable to the case at bar, Commissioner Woodlock said in a concurring expression in the same case:

> "Congress has enjoined upon the Commission the duty of 'preserving competition' so far as possible in the grouping of railroads through consolidation. If, however, it had desired to introduce yet more 'competition' into the industry, through control in the hands of this Commission over new con-

> struction and extensions, it would doubtless have instructed us to that effect, instead of referring us to 'public convenience and necessity' as the test to be applied to new projects. 'Competition' means alternative service available to a shipper or a district; it implies existence at all times of more facilities than are actually needed to move the traffic. The law clearly contemplates that railroad plant in existence shall, as a whole, receive a 'fair return' from the rates. It is impossible, therefore, to avoid the conclusion that when Congress gave us power to govern new construction it did so with the intent that we should prohibit the building of unnecessary new facilities. New facilities become necessary when existing facilities become inadequate. 'Monopoly' is not necessarily synonymous with inadequacy. *'Competitive' facilities are not 'necessary' merely because they are 'competitive.'* Doubtless every shipper is ready at all times to welcome another railroad into his territory; doubtless every railroad is ready at all times to enter another railroad's territory and share the business that the other has developed; doubtless no railroad desires a new 'competitor'; these are all very natural states of mind. But somebody must pay for the new facilities and they must be supported by the rates." (p. 51.)

On another occasion, in *Public Convenience Application of Utah Terminal Ry.* (1922), 72 I. C. C. 89, *supra*, the Commission used language which cannot but be taken as condemning its action in the instant proceedings:

> "So long as the available supply of coal can promptly reach the consuming public over existing lines, it is difficult to perceive how public convenience and necessity can be served by the establish-

ment of competing facilities. 'Public convenience and necessity' has been defined as a 'strong or urgent public need.' *Wis. Telephone Co.* v. *Railroad Comm.*, 162 Wis. 383; 156 N. W. 614. A public need can hardly be predicated upon the demand of three shippers who may desire to introduce the element of competition in order to improve their position in their own competitive field. While one of the purposes of the Transportation Act, 1920, was to preserve competition between carriers, *the provisions of paragraphs* (18) *to* (20), *inclusive, of section* 1 *negative any presumption that it was the purpose of Congress to permit the construction of new and competitive lines of railroad where existing facilities are adequate or can be made so by the exercise of available administrative remedies.*" (pp. 93-4.)

The foregoing decisions by this Court and by the Commission, as well as the explicit terms of the Transportation Act itself, combine to demonstrate the entire accuracy of the allegations of the petition above referred to and to condemn as contrary to law and in the teeth of the purposes declared by Congress the action of the Commission complained of in this case.

3—Appellant Has Such an Interest in the Consequences of the Action of the Commission in Authorizing the Gilbert-Wharncliffe Line as to Subject It to Irreparable Injury of a Character Which the Courts Should Prevent.

It is respectfully submitted that the public wrong comprehended in the authorization of this wasteful construction involves a private wrong to appellant. It will be

remembered that over a long period of years and at great cost appellant has developed its Logan Subdivision and other lines in this territory so as to serve the traffic as it developed (R. 50). It was appellant's expectation, when conditions warranted, to connect its line to the west of Gilbert with its line in the eastern Guyandot Valley by means of construction down the Guyandot River from Stone Coal to Gilbert. But when the time came at length, not appellant, but the Virginian was granted the right to bridge the gap between the eastern and western reaches of the Guyandot. While not surrendering its belief that this involved an error by the Commission, appellant agrees that about the matter reasonably-minded men might differ. But when, in addition, a stranger to the territory is authorized to cross a mountain at great expense in order to tap the entirely adequate through line of appellant in connection with the Virginian's new line at Gilbert, and when it appears that this is permitted solely in order that the newcomer may transport at far greater cost coal which otherwise would move over appellant's line, then appellant declares it has suffered irreparable and wrongful injury which entitles it to relief at the hands of this Court.

The private right of a carrier to protection against unnecessary competitive construction arises by implication from the terms of the Transportation Act, and is fully recognized by decisions of this Court.

In *Piedmont & N Ry. Co.* v. *United States* (1930), 280 U. S. 469, *supra*, this Court refused to set aside an order of the Commission denying an application for a certificate of public convenience and necessity. The reasons were that no railroad subject to the Act has a right to extend its lines and that the order, being negative in

both form and substance, was not susceptible of violation and could not call for enforcement. In distinguishing the case from such suits as the one here, the Court, through Mr. Justice Brandeis, fully recognized the existence of the requisite legal interest of appellant, saying:

> "The case is entirely different from those cases where an application for a certificate is alleged to have been erroneously granted, as in *The Chicago Junction Case*, 264 U. S. 258, and *Colorado* v. *United States*, 271 U. S. 153. *There, a judicial review is provided in order to protect a legal right of the plaintiff alleged to have been infringed by an order which authorizes affirmative action.*" (p. 478.)

In the *Chicago Junction Case* (1924), 264 U. S. 258, *supra*, the suit was brought by a number of railroads, all competitors of the New York Central, the object of the suit being to enjoin the New York Central from acquiring, pursuant to an order of the Commission, exclusive control of terminal facilities which had theretofore been used in common by all of the parties to the suit. It was contended that the plaintiffs had not the legal interest necessary to entitle them to challenge the order. But the Court, after pointing out that in fact they had a vital interest arising out of the fact that they were competitors of the New York Central and that enforcement of the order would result in diverting a large volume of traffic from their lines to those of the New York Central, said:

> "It is true that, before Transportation Act, 1920, the Interstate Commerce Act would not have prohibited the owners of the terminal railroads from selling them to the New York Central. Nor would it have prohibited the latter company from making

the purchase. And, by reason of a provision then contained in Sec. 3 of the Interstate Commerce Act, the purchase might have enabled the New York Central to exclude all other carriers from use of the terminals. Compare *Louisville & Nashville R. R. Co.* v. *United States*, 242 U. S. 60; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 482. But Transportation Act, 1920, repealed that provision in Sec. 3; it made provision for securing joint use of terminals; and it prohibited any acquisition of a railroad by a carrier, unless authorized by the Commission. By reason of this legislation, the plaintiffs, being competitors of the New York Central, and users of the terminal railroads theretofore neutral, have a special interest in the proposal to transfer the control to that company." (p. 267.)

Without undertaking to review every decision of this Court where the legal interest of appellant is recognized, it suffices here to call attention further to *Texas & Pac. Ry.* v. *Gulf, etc., Ry.* (1926), 270 U. S. 266, *supra.* There, as has been shown, suit was brought to enjoin construction by the Santa Fe of a branch line which extended into an industrial district near Dallas, Texas, entering a neighborhood already served by the plaintiff. An injunction was awarded, and it will be observed that the only possible damage which could have accrued to the plaintiff was loss of revenue resulting from diversion of traffic which would otherwise have moved over its line.

VI.

CONCLUSION.

In conclusion, we would point again to the fact that the Commission disposed of the matter here involved

by an order which was accompanied by a very elaborate report fully reviewing the facts regarded by it as significant, and that from these facts it selected but two as supporting its authorization of the Guyandot's proposed line, to-wit, resulting competition between carriers and competitive service to shippers. Without contending that the Commission is required by law to find in its report every evidential fact upon which it rests its conclusion, we submit that where, as here, that body does in fact single out certain facts upon which it squarely predicates its action to the exclusion of all other considerations, there arises a practical presumption that what it ignored was regarded by it as unsubstantial. The additional facts advanced before and adopted by the lower court as supporting the order are either irrelevant or inconsequential, and cannot, in any sound view of the case, be regarded as furnishing substantial support for an order which must be predicated upon the existence of a *genuine public need.*

Moreover, the lower court joined the Commission in reliance upon the competitive considerations adverted to, and therefore united with the Commission in a palpable error of law. For it is not possible to see how, from the standpoint of the orderly and effective development of the law interpreting the Transportation Act and controlling its operation and enforcement, an injunction can be denied in a case of this character and the expressed intention of Congress at the same time prevail. Paragraphs (18)-(20) of Section 1 of the Act were intended to vest in the Commission supervisory power over new construction, to the end that wasteful and needless capital investment might be prevented and the public thus spared the inevitable burden which would otherwise fall

upon it. In this case it has been shown to the point of demonstration that the single purpose for which the Commission authorized the new construction involved is to afford an additional, though inferior, route to compete with existing and adequate facilities. It is impossible, within the bounds of reason, to imagine any new construction whatever connecting existing lines of railroad of which it could not be said it would furnish facilities that would provide additional competing routes. If, therefore, this Court is to withhold an injunction annulling an order of the Commission which authorizes new construction because of the single substantial fact that competition will be provided or increased by the construction, then indubitably the will of Congress will fail for want of effective application of its valid legislation.

Respectfully submitted,

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Richmond, Va.,
October 25, 1930.

Appendix

URGENT DEFICIENCIES APPROPRIATIONS ACT, C. 32, 38 STAT. L. 219, 220, U. S. C. A., TITLE 28, SECTIONS 41 (28), 43-48, INCLUSIVE.

"*Section* 41. (*Judicial Code, section* 24, *amended.*) *Original jurisdiction.* The district courts shall have original jurisdiction as follows:

* * * * *

"(28) *Setting aside order of Interstate Commerce Commission.* Twenty-eighth. Of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission. (June 18, 1910, c. 309, Sec. 1, 36 Stat. 539; Mar. 3, 1911, c. 231, Sec. 207, 36 Stat. 1148; Oct. 22, 1913, c. 32, 38 Stat. 219.)

* * * * *

"*Section* 43. *Venue of suits relating to orders of Interstate Commerce Commission.* The venue of any suit brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term 'destination' shall be construed as meaning final destination of such shipment. (Oct. 22, 1913, c. 32, 38 Stat. 219.)

"*Section 44. Procedure in certain cases.* The procedure in the district courts in respect to cases of which jurisdiction is conferred upon them by subdivisions 27 and 28 of section 41 of this title, and sections 20 and 43 of Title 49, shall be as provided in section 45 of this title. The orders, writs, and processes of the district courts may in these cases run, be served, and be returnable anywhere in the United States. (Oct. 22, 1913, c. 32, 38 Stat. 220; Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 938.)

"*Section 45.* (*Judicial Code, section 209.*) *District courts; practice and procedure in certain cases.* The jurisdiction of the district courts of cases brought under subdivisions 27 and 28 of section 41 of this title, and sections 20 and 43 of Title 49, shall be invoked by filing in the office of the clerk of the court a written petition setting forth briefly and succinctly the facts constituting the petitioner's cause of action, and specifying the relief sought. A copy of such petition shall be forthwith served by the marshal or a deputy marshal of the district court or by the proper United States marshal or deputy marshal upon every defendant therein named, and when the United States is a party defendant, the service shall be made by filing a copy of said petition in the office of the secretary of the Interstate Commerce Commission and in the Department of Justice. Within thirty days after the petition is served, unless that time is extended by order of the court or a judge thereof, an answer to the petition shall be filed in the clerk's office, and a copy thereof mailed to the petitioner's attorney, which answer shall briefly and categorically respond to the allegations of the petition. No replication need be filed to the answer, and objections to the sufficiency of the petition or answer as not setting forth a cause of action or defense must be taken at the final hearing or by motion to dismiss the petition based on said grounds, which motion may be made at any time before answer is filed. In case no an-

swer shall be filed as provided herein the petitioner may apply to the court on notice for such relief as may be proper upon the facts alleged in the petition. The court may, by rule, prescribe the method of taking evidence in cases pending in said court. In all other respects the practice and procedure shall conform as nearly as may be to that in like cases in a district court of the United States. (June 18, 1910, c. 309, Sec. 1, 36 Stat. 539; Mar. 3, 1911, c. 231, Sec. 209, 36 Stat. 1149; Oct. 22, 1913, c. 32, 38 Stat. 219.)

"*Section 46. (Judicial Code, section 208.) Suits to enjoin orders of Interstate Commerce Commission to be against United States.* Suits to enjoin, set aside, annul or suspend any order of the Interstate Commerce Commission shall be brought in the district court against the United States. The pendency of such suit shall not of itself stay or suspend the operation of the order of the Interstate Commerce Commission; but the court, in its discretion, may restrain or suspend, in whole or in part, the operation of the commission's order pending the final hearing and determination of the suit. (June 18, 1910, c. 309, Sec. 3, 36 Stat. 542; Mar. 3, 1911, c. 231, Sec. 208, 36 Stat. 1149.)

"*Section 47. Interlocutory injunctions as to orders of Interstate Commerce Commission; appeal to Supreme Court:* No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such appli-

cation. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit. In cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. (Oct. 22, 1913, c. 32, 38 Stat. 220.)

"*Section 48. (Judicial Code, section 211.) Suits to be against United States; intervention by United States.* All cases and proceedings brought under subdivisions 27 and 28 of section 41 of this title, and sections 20 and 43 of Title 49 shall be brought by or against the United States, and the United States may intervene in any case or proceeding whenever, though it has not been made a party, public interests are involved. (June 18, 1910, c. 309, Sec. 4, 36 Stat. 542; Mar. 3, 1911, c. 231, Sec. 211, 36 Stat. 1150; Oct. 22, 1913, c. 32, 38 Stat. 219.)"

INTERSTATE COMMERCE ACT, SECTION 1 (18)-(20), 41 STAT. 1, 477-8, U. S. C. A. TITLE 49, SECTION 1 (18)-(20).

"*Sec. 1, par. (18). Extension or abandonment of lines; certificate required.* No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment.

"*Sec. 1, par. (19). Application for certificate of commission; notice and hearing.* The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the commission may from time to time prescribe, and the

provisions of this chapter shall apply to all such proceedings. Upon receipt of any application for such certificate the commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

"*Sec.* 1, *par.* (20). *Issuance of certificate by commission; unlawful extension or abandonment of lines.* The commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly

authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both."

INTERSTATE COMMERCE ACT, SECTION 15 (6), 41 STAT. L. 486, U. S. C. A., TITLE 49, SECTION 15 (6).

"*Sec.* 15, *par.* (6). *Commission to establish just divisions of joint rates, fares, or charges; adjustments.* Whenever after full hearing upon complaint or upon its own initiative, the commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the commission shall by order prescribe the just, reasonable and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of

transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge."

ASSIGNMENTS OF ERROR (R. 98-101).

"In United States District Court

(Title omitted)

Assignment of Errors—Filed Dec. 14, 1929.

Comes now the Petitioner above named and presents this Assignment of Errors, and says that in the record and proceedings in the above-entitled case and the decree (hereinafter referred to as 'the decree') made and entered against it therein on the 14th day of December, 1929, there is error in the particulars hereinafter set forth, that is to say:

I.

The Court erred in making the decree.

II.

The Court erred in making the decree and dismissing the petition, because the action of the Interstate Commerce Commission, described and complained of in the Petition on file herein and hereinafter referred to as 'the action of the Commission', is void and of no effect because the record made before the Commission contains no evidence that the present or future public convenience and necessity require or will require the construction of the line of railroad in said Petition prayed to be enjoined.

III.

The Court erred in making the decree and dismissing said petition, because the action of the Commission is void and of no effect in that the record before the Commission, and the report of the Commission, affirmatively

show that said construction is and will be contrary to the present and future public convenience and necessity.

IV.

The Court erred in making the decree and dismissing said petition, because the action of the Commission is without authority at law, contrary to law, arbitrary and void in that it was based upon an erroneous conception and theory of the law, and in contravention of the Interstate Commerce Act.

V.

The Court erred in making the decree and dismissing said petition, because its action in that behalf was based upon (1) alleged reasons stated by the Commission and concurred in by the Court, and (2) alleged reasons not stated by the Commission, but nevertheless found and stated by the Court; and none of said reasons shows or tends to show any present or future public convenience or necessity for the construction of the line of which the construction is herein sought to be enjoined.

VI.

The Court erred in making the decree and dismissing said petition, in so far as its action in doing so was based upon reasons stated by the Commission, because the said reasons of the Commission and its action based thereon rested upon an erroneous conception and theory of the law and are in contravention of the Interstate Commerce Act, in that (as affirmatively appears from the report of the Commission) said reasons and action were solely based upon the naked findings that the construction thereby authorized would promote competition between carriers and assure competitive service, and were unsupported by any finding or any such fact of record asserting, prov-

ing, or tending to prove that such promotion of competition or assurance of competitive service was or will be required by present or future public convenience or necessity within the meaning of the Interstate Commerce Act.

VII.

The Court erred in making the decree and dismissing said petition, in so far as its action in doing so was based upon reasons which, though not stated by the Commission, were found and stated by the Court, because, as appears from the opinion of the Court filed herein, the only reasons, in addition to those stated by the Commission and mentioned in Assignment VI, for which the Court held the action of the Commission to be supported by the record, were:

(a) That the construction authorized by said action would originate traffic;

(b) That operating economies would be accomplished by said construction; and

(c) That an additional western outlet would be supplied and a new connection between existing or proposed lines of railway afforded;

which grounds are in fact and in law insufficient to sustain the decision of the Court because;

(a) The record wholly fails to show, and the Commission did not find, that any present or future public convenience or necessity would be subserved by reason of any origination of traffic by said construction;

(b) The record wholly fails to show, and the Commission did not find, that any operating economies would be accomplished as the result of said construction, and the record affirmatively proves not only that no operating economies would be accomplished as the result of said construction, but that the effect thereof would be to

place the burden of added operating expenses upon the national transportation system; and

(c) The record wholly fails to show, and the Commission did not find, that present or future public convenience or necessity require or will require the additional western outlet or the new connection between other existing or proposed lines of railway which would be afforded by said construction.

VIII

The Court erred in making the decree and dismissing said petition, because, as appears from its opinion filed herein, the only ground, in addition to those hereinbefore referred to, upon which the Court based its decision sustaining the action of the Commission was the Court's holding that authorization of construction other than that complained of in said Petition was inseparable from, dependent and contingent upon, the construction in said Petition sought to be enjoined; whereas, the Commission did not so find, and the record conclusively proves that no authorization of any construction other than the construction in said Petition sought to be enjoined was in anywise inseparable from, dependent or contingent upon the construction so sought to be enjoined.

Wherefore the Petitioner above named prays that the said decree entered herein on the 14th day of December, 1929, be reversed, with directions that the injunction be issued in accordance with the prayers of the said petition and that there be granted such other and further relief as may be appropriate.

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